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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 670

HERSCHEL S. GREEN and MADGE GREEN,
Petitioners

v.

OSCAR L. GREEN, ROBERT A. GREEN,
QUENTIN L. GREEN and ALICE GREEN,
Respondents

RESPONDENT'S BRIEF

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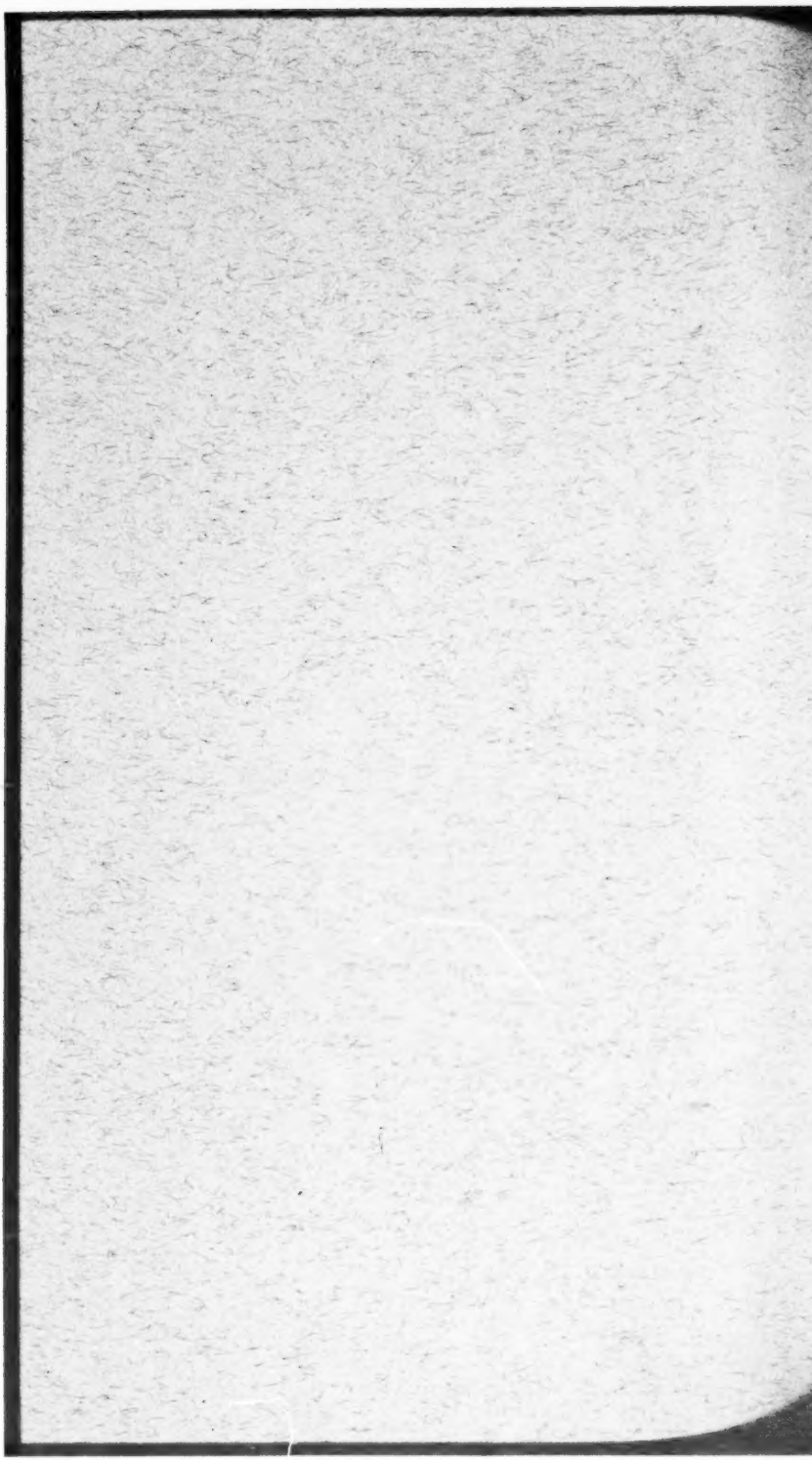

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Respondents

RESPONDENT'S BRIEF

COUNTER-STATEMENT

Respondents consider the following material statements in petitioners' brief to be inaccurate and misleading.

Petitioners' brief p. 6 states that "*Even Oscar Green who operated the properties for a while prior to Herschel, operated them as a single unit.*" Oscar has never operated the properties in the capacity of trustee.

Petitioners' brief p. 8 states that "*in the complaint as amended the plaintiffs asked for an accounting, a restoration of funds allegedly used by the Trustee or lost by his improper conduct, and asked that the Trustee be removed.*" Such amended complaint asks that the trustee of the James A. Green trust be removed. It does not ask that the trustee of the Martha Green trust be removed. See Amended Complaint, Tr. p. 32-34.

Petitioners' brief p. 9 states that "*by virtue of the amended complaint, Plaintiffs were asking and the Court had taken control of the res of the trust estates;*" Such amended complaint did not ask the court take possession of the *res*, nor can it be construed in any way to be other than an action *in personam* as it pertains to the Martha Green trust. The Federal District Court, up to the time Herschel resigned as trustee of the Martha Green trust (Tr. 65) did not attempt to exercise any jurisdiction whatever over the *res* of the Martha Green trust (Tr. 97). Such jurisdiction over the *res* of the Martha Green trust was exercised only after all parties in interest had accepted the voluntary resignation of Herschel as such trustee and had agreed and consented to the appointment of a successor trustee by the court (Tr. 66).

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SUMMARY OF ARGUMENT

A. The State proceeding was strictly limited to the trust estate of Martha Green and the specific relief sought in connection with that estate. Herschel S. Green cannot enlargen that action, in his capacity of trustee of such estate and also of the James A. Green trust estate, because he deliberately and wrongfully commingled the assets, income and disbursements of such separate and distinct trust estates. The action in the State court was initiated by only one of several beneficiaries, and was strictly an action *in personam*. The court was not asked to settle the status of or title to any property, or subject any property to any action of the court, or to remove the trustee. No charge of insecurity, misconduct or wrongful dealing of any kind was made, and the trustee was only asked to file a true and correct account of his doings as trustee of the Martha Green estate. No answer or counter-claim whatsoever was filed by the defendant trustee. The Petitioner filed a motion to withdraw his petition. No finding was ever necessary, no decree was ever entered. The Federal District Court, having general jurisdiction in equity to administer trusts, is the first and only court to acquire jurisdiction of all parties in interest of both aforesaid trusts, the beneficiaries of which are not the same. The administration of trusts in *Illinois* is not subject to express legislation and is not a probate matter and such court has no present jurisdiction of either trust.

B. Diversity of citizenship is to be determined by the real interest of the parties in the subject matter of the suit and their sides in the dispute. It is not Madge Green as an individual, but the widow, if any, of either son dying

without a child or children surviving him that is designated as contingent remainderman in the codicil of Martha Green to her will. Madge, as such widow, has a mere intangible, contingent expectancy in the future income, if any, of the Martha Green trust only. She has no interest whatsover in the James A. Green trust. In *Illinois,* to be an essential necessary party a beneficiary must have a present substantial interest, as distinct from a mere expectancy, or future contingent interest.

The fact that Madge Green unquestionably particpated in the money wrongfully appropriated by Herschel, and will also unquestionably be vitally affected economically if her husband is now required to pay his co-beneficiary his rightful share of the trust incomes, is indicative of her real interest in the matter and why from the very inception of this case she immediately aligned herself in utter opposition to the plaintiffs and maintained that position for more than two years after the complaint was filed.

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ARGUMENT

A. The Action in the State Court Was an Action *In Personam*, and the State Court, by Virtue Thereof, Has No Prior, Exclusive Jurisdiction.

Although defendants admit the State proceeding was filed only in regard to the Martha Green trust, they claim such proceeding in fact also involves the James Allen Green trust (Tr. 73, 109). This self-serving conclusion is based upon the fact that Herschel filed a series of reports, each of which indiscriminately combined his personal items of income and expenditure and those of the two independent trusts (Tr. 51-52, 57-59, 75).

The proceeding in the State court, entitled "In the Matter of Herschel S. Green, Trustee under the Will of Martha Green, Deceased", was initiated by the petition of Oscar L. Green, one of the present plaintiffs (Tr. 20-22). A copy of the last will and codicil thereto of Martha Green was attached to such petition (Tr. 22). Neither the allegations or prayer of such petition included or made any reference whatsoever to the James Allen Green trust.

In *Warner v. Mettler* (a case involving a trust), 103 N.E. 259, 260 Ill. 416, at 422, the court said:

> "Parties are only entitled to such relief as comes within the scope of their bill. The decree must conform to and be limited by the prayer for relief."

See also: *Martin v. Frank*, 259 Ill. App. 417, 425; *Brewer v. Brown*, 109 N.E. 264, 268 Ill. 562, 568; *Rice v. McJohn*, 91 N.E. 431, 244 Ill. 264, 271.

In *Brinkerhoff v. Huntley*, 223 Ill. App. 591, at 599, the the court said:

> "While it is true the bill contains a prayer for gen-

eral relief, its allegations can support nothing except its prayer for specific relief."

Herschel, as trustee, did not file any answer or counterclaim to the petition filed by Oscar in the State court (Tr. 23-24). The reports he subsequently filed in the State court gave no explanation why they included matter pertaining to another trust not in issue and also personal income and expense items of Herschel and his wife. Herschel, however, subsequently testified under oath that he deliberately mingled the assets, income and disbursements of the two separate and distinct trusts, and it is now impossible for him to determine what the income from each trust has been, or what disbursements could be charged to each trust, or, to separate said trusts and said trust operations (Tr. 57-61, 75). Likewise, it was impossible for him to properly identify and separate many of his personal expenditures, inasmuch as his personal funds and the funds of both trusts were deposited in one common bank account (Tr. 59). Herschel admits he made no effort, and never intended to keep the assets, income and disbursements of the two trusts separate (Tr. 57). He insists his father and mother operated their separate properties together during their lifetime (Tr. 73) and he was entitled to continue such custom after their death (Tr. 57-58).

James Allen Green and Martha Green, although husband and wife, held their property separately in their lifetime (Tr. 51) and also deemed it wise and desirable to create separate and distinct testamentary trusts of their sole and separate estates by individual last wills (Tr. 52, 11-17). The language of their individual wills indicate no intention on the part of either that their trust should be administered differently from any other trust. If either had so intended, they would have explicitedly so stated.

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In *Johnson v. Sarver* (the trustees operated a very valuable business consisting principally of eight separate and distinct farms, varying in size from 160 acres to 240 acres), 113 N.E. 2d 578, 350 Ill. App. 565, 578, 581, 582, the court said:

> "the second clause which directs the trustee to 'carry on the farming and other business affairs of my estate as nearly as possible and as circumstances will permit as I am now and have for many years past done * * *.'
>
> The language he used does not indicate that he intended that the trust he created should be administered differently from any other trust. Counsel for appellants insist that to keep separate accounts and records showing all transactions of several individual farms would require a full-time bookkeeping assistance with added expense to the trust; that it would be impossible to correctly allocate some of the combined expenses without losing the economic advantage to the trust of the large purchasing power that it has by combining several farms; that the court had no authority to tell them how to keep their accounts, as the method of bookkeeping which they may use is entirely within the discretion of the trustees. There is no merit in this contention.
>
> Without separate accounts for each farm neither the beneficiaries nor the court could know what every beneficiary and every court is entitled to know concerning the administration of the trust.
>
> The chancellor correctly decreed that appellants should keep separate accounts as to each farm."

See also: 65 *Corpus Juris, Trusts,* secs. 519, 563; *Wylie v. Bushnell,* 115 N.E. 618, 277 Ill. 484, 491.

By accepting the trust, Herschel became bound to execute it strictly in accordance with the terms of the trust instrument. See 65 *Corpus Juris, Trusts,* sec. 519; *Carlstrom v. Frackleton,* 173 N.E. 153, 263 Ill. App. 250, 268;

Cowles v. Morris & Co., 161 N.E. 150, 330 Ill. 11, 24-25. The discretion of a trustee is not an arbitrary discretion. It does not include the unrestrained power to do what the trustee pleases. He must not act under the impulse of fraud, collusion, or self interest. See 26 *Ruling Case Law, Trusts,* secs. 234-5. A trustee is not permitted to change the nature, objects and purposes of the trust and vary the rights of the beneficiaries (65 *Corpus Juris, Trusts,* sec. 518; 54 *Amer. Jur., Trusts,* 1945, sec. 294; *Angell v. Jewett,* 58 Ill. App. 596), otherwise a trustee could thus in effect destroy the express intent of the trustor. Herschel knew his wife Madge had a contingent interest in the Martha Green trust, but no interest whatever in the James Allen Green trust (Tr. 52). Herschel, by his own tortuous act, cannot enlarge the action in the State court to include the *res* in the estate of James Allen Green where the *cestuis que trust* are not the same (Tr. 99).

Good faith is the essence of a trustee's obligation. A trustee is not permitted to place himself in a position where it will be difficult for him to be honest and faithful to his trust. See *Campbell v. Albers,* 39 N.E. 2d 672, 313 Ill. App. 152, 157. It is immaterial whether defendant Herschel S. Green acted in good faith or bad in commingling the two trust estates and his own personal business. See *United States v. Howard,* 7 Cir., 96 F. 2d 893.

In *Stone v. Baldwin,* 109 N.E. 2d 244, 348 Ill. App. 225, at 236, the court referring to numerous Illinois decisions, said:

> "Where there has been a negligent failure to keep accounts all presumptions will be against the trustee."

No answer or counter-claim was ever filed by the defendant trustee in the State proceeding; no objections

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were interposed to the reports filed there by the trustee; no issue was there presented or determined; no decree or finding was ever necessary, nor was any ever entered (Tr. 23-24, 99). Prior to the time this action was instituted in the Federal District Court, Oscar filed a motion to dismiss his petition in the State court (Tr. 24, 87), pursuant to the provisions of Sec. 52 of the *Illinois Civil Practice Act* Chapter 104 *(Jones Illinois Statutes Annotated,* Vol. 18, Sec. 104.052), as follows:

> "The plaintiff may, at any time before trial or hearing begins, upon notice to the defendant or his attorney, and on payment of costs, dismiss his action or any part thereof as to such defendant, without prejudice, by order filed in the cause."

Although no objection has ever been made to the aforesaid motion to dismiss, and the State court has never entered its proper order of dismissal (Tr. 24, 87), the filing of such motion to dismiss negatives any present intention of Oscar to pursue that case further (Pet. 55).

The petition filed by Oscar in the State court made no charge of insecurity, misconduct or wrongful dealing of any kind. It did not seek the removal of the trustee. It did not claim any money due and owing petitioner and demand payment. The court was not asked to settle the status of or title to any property, or subject any trust property to any action of the court. The relief asked was limited to a prayer that Herschel S. Green, as trustee under the will of Martha Green, be ordered to file a true and correct report and account of all his acts and doings as such trustee from June 9, 1942 to the date of such report (Tr. 22).

Defendant Herschel S. Green has never been appointed or confirmed as trustee of either the James Allen Green or Martha Green trust by any court (Tr. 101). Nominated

as trustee of such separate and distinct testamentary trusts in the will of James Allen Green and Martha Green respectively, he subsequently and voluntarily assumed the duty and obligation of administering such trusts without giving any bond or other security then, or at any time thereafter, to any court (Tr. 56-57).

The defendant trustee did not file any answer or counterclaim in the State proceeding. The pertinent parts of the proceeding in the State court consisted of the aforesaid petition; the filing of reports by the trustee; the subsequent motion to dismiss his petition by the petitioner, and a motion thereafter by the trustee to amend reports previously filed. No such amended reports were ever filed (Tr. 23-24). Under well settled principles of law, the proceeding in the State court was, under the circumstances related, a proceeding strictly *in personam*. A court of equity, in the establishment and enforcement of a trust, or in holding a trustee liable for a breach of trust, proceeds *in personam*. A proceeding for the removal of a trustee has been regarded as *in rem*. See 54 *Am. Jur.*, Sec. 561.

In *Words and Phrases, Permanent Edition*, Vol. 21, at 526 and 541, it is said:

> "Proceeding *in personam*" is a proceeding against person which involves personal rights and is based on jurisdiction of person. *McCormick v. Blaine*, 178 N.E. 195, 345 Ill. 461.
>
> The term '*in rem*' does not admit of a definition comprehensive and exact, but has been described as a proceeding instituted, not against persons, but against things or subject matter itself, state or condition of which is to be determined, judgment in proceeding having effect of binding all parties in interest. *Austin v. Royal League*, 147 N.E. 106, 316 Ill. 188, cited with approval in *Killebrew v. Killebrew*, 398 Ill. 437."

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In *McCormick v. Blaine,* 178 N.E. 195, 345 Ill. 461, at 465, the court said:

> "A judgment *in rem* may be briefly defined as one founded on a proceeding instituted not primarily against the person but against or upon some thing or subject matter the status or condition of which is to be determined. Such judgment is one affecting the status of the *res.* A proceeding *in personam* is a proceeding against the person. It involves his personal rights and may involve his right to specific property or the exercise of the ownership of such property, but it is based on jurisdiction of his person. *Windsor v. McVeigh,* 93 U.S. 274."

The State court was not asked, nor was it required to take control of the Martha Green trust *res* for any purpose whatsoever. See *Brown v. Buffin* 13 F. 2d 708. In *Hall v. Cottingham,* 55 F. 2d 659, aff'd, 4 Cir., 55 F. 2d 664, the court held that a suit for accounting against an administrator and guardian and the surety on his bond was a suit *in personam.* In *Garrett v. First National Bank & Trust Co.,* 5 Cir., 153 F. 2d 289, at 290, the court held that an action brought by the beneficiaries of certain trusts seeking accountings of trustees was an action *in personam.* See *Kline v. Burke Constr. Co.,* 260 U.S. 226, 228; *Union Producing Co. v. White,* 5 Cir., 153 F. 2d 856, 858; 157 F. 2d 254. Although the petition filed by Oscar in the State court contained a prayer for general relief, that fact did not enlargen the scope of the petition, increase the jurisdiction of the State court, or change the character of that proceeding from one *in personam* to one *in rem.* See *Martin v. Frank,* 259 Ill. App. 417, 425; *Brinkerhoff v. Huntley,* 223 Ill. App. 591, 599-600; *Langlois v. People,* 72 N.E. 28, 212 Ill. 75, 85.

All beneficiaries are necessary parties to a proceeding to remove a trustee appointed by will. All action taken, even the turning over of trust funds to a new trustee ap-

pointed is a nullity and is a wrongful diversion of funds as to beneficiaries who were not parties. See *Gottfred v. Woodruff*, 96 Ill. App. 295, 300; *Austin v. Royal League*, 147 N.E. 106, 316 Ill. 188, 194; *Butler v. Butler*, 45 N.E. 426, 164 Ill. 171, 177. The very essence of an *in rem* action is the power of the court, not only to control the actions of the trustee, but, to remove such trustee and appoint a successor trustee, and to settle the status or title to any trust property, or subject any trust property to the action of the court binding on all beneficiaries. An action *in rem* implies the power of the court to control and even order the disposition of all the property or *res* involved. Here, however, the State court has no such aforesaid power. Unlike the suit in the Federal District Court wherein all beneficiaries and remaindermen, both vested and contingent, are subject to the jurisdiction of the court, the proceeding in the State court is one instituted by and strictly limited to only one beneficiary, a mere life tenant, against the trustee. The other beneficiaries and remaindermen, especially the beneficiaries, Robert A. Green and Quentin L. Green, in whom title to the trust property is vested, are not parties to such proceeding, nor is there any claim made by anyone of any due process, actual or substituted, or of any notice whatsoever to such additional beneficiaries and remaindermen. With the exception of Madge Green, who possesses only a remote contingent interest, the remaining beneficiaries of the Martha Green trust are residents of the State of *Texas*, and are not within the jurisdiction of the State court (Tr. 26). Thus, the State court, not having jurisdiction of necessary parties in interest, could perhaps compel the defendant trustee to file the account or report sought by Oscar, but such court could not even hear any objections made thereto. It could not remove the defendant trustee, even for cause, appoint a successor, fix his compensation, or dispose of and cause to be transferred

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any funds belonging to said trust estate. See *Huston v. Weed,* 242 Ill. App. 495, 500; *Butler v. Butler, 45 N.E.* 426, 164 Ill. 171. The aforesaid facts, in themselves, precludes any claim that the proceeding in the State court has ever been, or could be, a proceeding *in rem,* or *quasi in rem.*

The State court has never had possession of the *res* of the Martha Green trust, or any necessity to administer such *res,* as is claimed by petitioners (Pet. 10). It has no reason to do so. No issue was ever presented. No answer or counter-claim was ever filed by Herschel, and no affirmative relief was ever claimed or sought in that proceeding (Tr. 23-24). Herschel was acting as trustee not by appointment of court, but by appointment in the will of Martha Green (Tr. 15, 52, 57, 101), negativing any necessity of presenting his resignation to the State court, as petitioners allege (Pet. 10). Even if Herschel did present his resignation to the State court, such resignation would be ineffective without the express consent of all beneficiaries and remaindermen in being, inasmuch as such court lacked the necessary jurisdiction of all such interested parties. See *Gottfred v. Woodruff,* 96 Ill. App. 295, 300; *Austin v. Royal League,* 147 N.E. 106, 316 Ill. 188, 194; *Butler v. Butler,* 45 N.E. 426, 164 Ill. 171, 177. Such was not the case when Herschel subsequently presented his voluntary resignation as trustee of the Martha Green trust (Tr. 65) to the Federal District court and to all parties in interest, the beneficiaries and remaindermen in being of the Martha Green trust (Tr. 102). That act, on the part of Herschel, and the acceptance of such resignation by all parties in interest, was a complete and independent act within itself. It is comparable to a settlement by the parties to a civil action prior to a decree, because up to the time Herschel submitted such resignation, the Federal District

Court had not exercised, or attempted to exercise, any jurisdiction whatever to remove Herschel as trustee of the Martha Green trust, nor did it or the plaintiffs ever claim it had jurisdiction to do so without the express consent of all parties in interest, or by amendment of the complaint filed in the District Court, because the complaint filed in the District Court, as it pertains to the Martha Green trust did not ask that Herschel be removed as trustee of such estate (Tr. 32-34). See *Warner v. Mettler,* 103 N.E. 259, 260 Ill. 416, at 422; *Brinkerhoff v. Huntley,* 223 Ill. App. 591, at 599. See also *Martin v. Frank,* 259 Ill. App. 417, 425.

There is no attempt here by the Federal District Court, or the United States Court of Appeals for the Seventh Circuit to establish a new and inconsistent doctrine as is inferred by petitioners (Pet. 22-23). If the proceeding instituted by plaintiffs in the Federal District Court, as it pertains to the Martha Green trust, subsequently became a proceeding *in rem* (Tr. 102; Pet. 55-56) it would be solely because of the voluntary resignation of Herschel (Tr. 65), and its express acceptance by all parties in interest.

The petitioners contend the Opinion of the Court of Appeals in this case indicates that court felt that the defendants were estopped to raise the question of jurisdiction, or had and could waive it (Pet. 21-22). A reading of the Opinion (Pet. 45, sec. 2) clearly refutes that contention. Petitioners seem to be laboring under the false assumption that the federal court lacks jurisdiction of the subject matter, as where there is a lack of diversity of citizenship. But the federal courts have general jurisdiction in equity to administer trusts, entertain suits by beneficiaries against trustees; to remove a trustee or appoint a

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successor so long as diversity exists and jurisdiction over necessary parties is obtained. See 28 *U S C A.*, Sec. 1332; *In re Gray's Estate,* 7 Cir., 66 F. 367, 369.

In re Gray's Estate, 66 F. 2d 367; and *West v. First Fond Du Lac Nat. Bank,* 31 F. Supp. 169, cited by petitioners (Pet. 16, 17), are not applicable to defendants' position in the present instance inasmuch as they both involve matters strictly probate in nature, the federal court would have no jurisdiction of the subject matter. See *Sutton v. English,* 246 U.S. 199; *Farrell v. O'Brien,* 199 U.S. 89.

A party has the legal right to bring his action in any court which has jurisdiction of the subject matter and can obtain jurisdiction of the parties. See 21 *C. J. S., Courts,* Sec. 35 b, page 46. In this case the Federal District Court is the first and only court to acquire jurisdiction of interested parties (Tr. 102), a necessary requisite to the authority to determine the entire controversy. See *Butler v. Butler,* 45 N.E. 426, 164 Ill. 171, 177; *Austin v. Royal League,* 147 N.E. 106, 316 Ill. 188, 194; *Huston v. Weed,* 242 Ill. App. 495, 499-501; *Meredith v. City of Winter Haven,* 320 U.S. 228, 234, 237; *Rogers v. Girard Trust Co.,* 159 F. 2d 239, 242.

The proceeding instituted in the State court did not involve the trust estate of James Allen Green (Tr. 20-22), and the Federal District Court, unquestionably, has acquired original and exclusive jurisdiction of that trust *res* and of its trustee.

This suit in the Federal District Court in respect to the Martha Green trust estate was originally, as appears by the Amended Complaint filed therein (Tr. 26-34), clearly an action *in personam.* Plaintiffs, by virtue of their amend-

ed complaint, did not ask, as petitioners claim (Pet. 9), that the Federal District Court take control of the *res* of the Martha Green trust. The defendants, by their request and voluntary acts subsequently and unquestionably, themselves invoked the jurisdiction of the Federal District Court over the *res* of the Martha Green trust estate (Tr. 64, 65, 66, 97). Inasmuch as the State proceeding was clearly an action *in personam,* the doctrine of comity was not involved. See *Baltimore & Ohio R.R. Co. v. Wabash R.R. Co.*, 7 Cir., 119 F. 678, 679, 680; *Kline v. Burke Const. Co.*, 260 U.S. 226, 230.

Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, cited at great length by petitioners (Pet. 9, 11, 12, 13, 14), is no authority in the instant case in the Federal District Court. The *Pennsylvania* State court in a prior suit had enforced the trust and the three trustees had filed an account in that court which had been confirmed. Subequently the two surviving trustees filed a partial account, and on the next day a suit was filed in the federal court praying for an accounting and removal of the trustee. *Pennsylvania* statutes (20 P.S. Secs. 2833, 2853, 2925) provide two methods for invoking the jurisdiction of the State court with respect to the administration of the trust. The court may cite the trustee on application of any person in interest "to exhibit an account of the management of the trust estate", and the trustee may on the other hand, obtain an adjudication of his management of the trust by filing his account in the office of the prothonotary of the court every three years, providing he gives actual notice, when the account shall be filed to all persons interested in the estate, under the terms and provisions of the trust; and that advertisement shall have been made of the filing of said accounts, etc. *Illinois has no such* statutes. In *Illinois,* a trustee appointed under a will has

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no access to the circuit court except at his own expense unless the will requires construction. There are no statutes or decisions in *Illinois* holding that the mere filing of an account by a trustee bestows upon an *Illinois* court complete jurisdiction over all phases of the administration of the trust, or providing for the filing of an account by the trustee periodically (Tr. 103); *Huston v. Weed,* 242 Ill. App. 495, 499; *Warner v. Mettler,* 103 N.E. 259, 260 Ill. 416, 420-422; *Arnold v. Alden,* 50 N.E. 704, 173 Ill. 229, 242.

Although petitioners extensively quote from *In re Gray's Estate,* 66 F. 2d 367 (Pet. 17, 18, 19), they fail to disclose that in such case the court predicated its decision upon express *Indiana* legislation. On page 370, it is said:

> "Section 1786 of the Indiana Statutes (Burns' Ann. St. 1926) which relates specifically to the Vanderburgh Probate Court, provides that said court within and for that county shall have original and exclusive jurisdiction in all matters pertaining to the probate of wills, the appointment of executors, administrators and trustees, and the administration and settlement of decedent's estates, and of trusts and all other probate matters."

Likewise, petitioners, quoting *Swanson v. Bates,* 170 F. 2d 648 (Pet. 19, 20), again fail to disclose that the decision therein was also predicated upon express legislation. The decision was determined by the *Oklahoma Trust Act* (60 Okl. St. Ann., Secs. 175.1 to 175.53 inc.). In rendering the decision, at 650, the court said:

> "A State may change methods of procedure, or substitute one remedy for another. It is free to 'choose the remedy best adapted', in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or abitrary, and the procedure it adopts satisfies the constitutional requirement of reasonable notice and opportunity to be heard."

In *Illinois,* the probate court is not a court of general jurisdiction, but its jurisdiction is circumscribed and restrained by the constitution; and legislative acts which attempt to extend such jurisdiction are violative of the constitution. See *Howard v. Swift,* 190 N.E. 102, 356 Ill. 80, 84; *In re Estate of Shanks,* 282 Ill. App. 1. The fact that Herschel has never been discharged as executor of the Martha Green estate is of little import. The records in that estate indicate it has been fully administered and its funds transferred to him as trustee. Thus, it must be concluded, the failure to close such probate proceedings pertaining to the Martha Green estate for over 10 years can be attributed solely to the neglect of Herschel; the lack of legal necessity therefor, or to some purely personal motive not as yet revealed by Herschel. When the duties of an executor are completed and his duties as trustee begins, he holds the funds as trustee and not as executor, and no formal order of transfer from executor to trustee is necessary. See *Brinkerhoff v. Huntley,* 223 Ill. App. 591, 605; *Fenton v. Hall,* 235 Ill. 552.

B. There Is Diversity of Citizenship, the Parties Being Properly Aligned, and Hence the District Court Has Jurisdiction.

Throughout petitioners' brief, counsel conveniently speaks of "the trust", or the "trust *res*", and uses similar expressions without specifying if it is the James Allen Green trust or the Martha Green trust to which they seek to apply whatever point or argument is being made. Counsel speaks as if both trusts are one, and all action taken and all contended rules of law and cases cited to support the same, apply equally to both trusts without separation in any manner. Thus, it appears counsel is be-

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clouding the fact that the question of diversity of citizenship does not apply in this case in any way to the James Allen Green trust. It must be clearly kept in mind that neither Madge Green or Alice Green have any interest whatsoever in the James Allen Green trust estate. The defendant Herschel S. Green, a citizen of the State of *Illinois*, and the plaintiffs, Oscar L. Green, Robert A. Green, and Quentin L. Green, all citizens of the State of *Texas*, are the only parties in being having any interest whatever in the James Allen Green trust.

The defendants after more than two years (Pet. 57), now claim Madge Green is a necessary and indispensable party to this suit, and contend that if she is properly realigned, the Federal Court would be deprived of its jurisdiction, inasmuch as there would then be a citizen of *Illinois* among the plaintiffs, and a citizen of *Illinois* as the sole defendant.

Certain uncontradicted facts must be briefly reviewed. This suit unquestionably involves two distinct and separate testamentary trusts, created by individual will and codicil (Tr. 11-19), whereby James Allen Green and Martha Green, husband and wife, each dispose of a sole and separate estate (Tr. 51, 52). The claims pertaining to each trust estate are separate, independent and distinct, although such claims have been joined in one suit. Furthermore, the beneficiaries and remaindermen in being of the two trusts are not the same. See Rule 18(a) Federal Rules of Civil Procedure, Title 28 U S C.

Each aforesaid will created a life estate in trust of the residue remaning on the death of the survivor, the income of which is to be paid in equal parts to Oscar L. Green and Herschel S. Green the two sons of the respective parties during their natural lives, at such times as the trustee

might think best for the estates. In event that either son dies, his portion of the income is to be paid to his children, if any, and upon the death of both sons, the estates are to be divided equally between the children, ending the trusts (Tr. 12, 15-16). A subsequent codicil of Martha Green to her will (Tr. 17-19), provides that the widow of either son, dying without a child or children surviving, be substituted for her deceased husband, and entitled to his share of her trust estate income until such widow dies or remarries. Defendant Herschel S. Green was appointed trustee under the terms of each will. He and his brother Oscar L. Green are the only beneficiaries named in the two wills. Plaintiffs Robert A. Green and Quentin L. Green, sons of Oscar, are the only children in being of such named beneficiaries, and the only remaindermen with a vested interest capable of being presently identified and/or ascertained.

Plaintiffs have not stated their independent claims in separate counts, but have joined them in their complaint to facilitate the clear presentation of the matters set forth. The primary and controlling matter in dispute, concerning both trusts, is the claim that defendant Herschel S. Green, as trustee, has not paid out the income of such trusts in equal parts to the named beneficiaries, according to the express provisions of each trust (Tr. 12, 15, 18), but has fraudulently concealed the true income of both trusts, and has wrongfully used his position as trustee to pay himself personally upwards of $52,000.00 and only $620.00 to Oscar L. Green, his co-beneficiary (Tr. 30-32). *Everything else in the case is incidental to this dominating controversy, with respect to which Oscar and Herschel are on opposite sides.* It is also claimed Herschel has wrongfully transferred assets from the James Allen Green trust to the Martha Green trust, and has wrongfully mingled his per-

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sonal funds with those of both trusts in one common bank account.

The principal purpose of the suit, the relief demanded is that the court determine and award to Oscar his just portion of the true income of both trusts, according to the express terms thereof, and that Herschel be removed as trustee of the James Allen Green trust (Tr. 33-34). Plaintiffs also ask that Herschel be required to restore to the Martha Green trust any money or property lost thereto by virtue of his fraudulent, illegal, wrongful and/or negligent conduct (Tr. 34), but this is unquestionably secondary, because they do not claim or allege any specific money or property has been lost, nor do they ask that Herschel be removed as trustee of the Martha Green trust. Furthermore, Herschel has heretofore voluntarily resigned as trustee of the Martha Green trust, and all parties of interest have accepted such resignation and agreed upon a successor trustee whom the court has appointed with their express consent (Tr. 65, 66, 97). That successor is the survivor of the two individuals whom the testator and testratrix nominated and appointed trustee in the two aforesaid wills in case Herschel refused or neglected to accept the trusts therein created (Tr. 13, 17, 97).

Thus, it would appear the secondary purpose of the suit has already been resolved. The voluntary resignation, coupled with the consent of all parties of interest, both vested and contingent, and the appointment of a successor trustee with their express consent, was a complete and independent act within itself. It would seem peculiar reasoning to say the proceeding then pending in the District Court was a bar to such voluntary action on the part of the trustee and all interested parties. The complaint filed in the District Court did not demand the removal of

the trustee of the Martha Green trust estate. or the appointment of a successor trustee. The District Court did not order the removal of Herschel as trustee of the Martha Green trust. It did not, up to the time of such resignation exercise, or attempt to exercise, any jurisdiction whatever to remove him as trustee of the Martha Green trust, nor did it or the plaintiffs claim it had jurisdiction to so do. It is only after Herschel voluntarily resigned that the court appointed a successor trustee, the alternate named in the will of Martha Green, and then such appointment was made at the request, and with the consent of all parties concerned (Tr. 66, 97). It would seem absurd, under such circumstances, to say an accounting and/or settlement by Herschel should not follow as a natural course, or that he is not accountable for all money or property he had in his possession while trustee (*Warner v. Mettler*, 103 N.E. 259, 260, 260 Ill. 416), especially when the subsequent order of the court to that effect was entered with the consent of all concerned (Tr. 97). It would also seem reasonable to say that, once appointed under such circumstances, the said successor trustee can now be removed only by a proper proceeding instituted for that purpose.

It is easy to see that petitioners now hope to summarily return Herschel to power as trustee of the Martha Green trust estate by somehow avoiding the legal effect of his voluntary resignation as trustee of such trust. It is quite apparent they hope to use defendant Madge Green as the key to that end. But, petitioners fail to point out, or even consider, that the proceeding in the District Court pertaining to the Martha Green trust, as instituted by plaintiffs, was not a proceeding to remove the trustee, but merely a proceeding *in personam*. At the top of page 23 of their brief, however, petitioners now appear to agree such proceeding is *in personam*. They also fail to point out that the

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resignation of Herschel, as trustee, was entirely voluntary on his part, and that the consent of Madge thereto was also entirely voluntary on her part, and since all parties concerned accepted such resignation, it is irrevocable.

As Circuit Judge Major aptly says (Pet. 57), defendants' challenge to diversity jurisdiction is the last maneuver in the case, made for the first time more than two years after the complaint was filed, and then only after the court had entered an order, with the consent of all concerned, that Herschel make an accounting for all his acts and doings as trustee (Tr. 97).

Although defendants have always heretofore claimed Oscar and Herschel were the only real parties in interest, and no other party was necessary to the final determination of the issues involved at the present time (Tr. 19, par. 3B; 73, par. 1), they now say Madge is an indispensable party and should be realigned to deprive the District Court of all jurisdiction. Aligned for what purpose? So that Herschel should not be required to restore to the Martha Green trust estate any money or property determined to be lost thereto because of his malfeasance after he voluntarily resigned as trustee and she has expressly consented thereto? Even before there has been any determination that any specific money or property has so been lost, that question should be resolved.

Rule 19(a) of the Federal Rules of Civil Procedure, Title 28 USC, deals with what is called the necessary joinder of indispensable parties and gives the court power to bring in all parties needed to fully dispose of the case. It gives the court the power to omit parties not indispensable if by joining them the court would be deprived of jurisdiction of the case. See *Young v. Garrett*, 149 F. 2d 223, 228.

The realignment of Madge Green as a party plaintiff can be justified only if Madge Green is an indispensable party to this suit as it pertains to the Martha Green trust, and her interest in the subject matter of this suit as it pertains to the Martha Green trust is of such a nature that a final decree can not be entered in the case which will do justice between the parties before the court without injuriously affecting that interest, or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience. It is pertinent to bear firmly in mind that it is not Madge Green as an individual, but the widow, if any, of either son dying without a child or children surviving him, that is designated as contingent remainderman in the codicil of Martha Green (Tr. 18). Not in respect to the corpus of such trust estate, but only in the future income, if any, of the Martha Green trust.

It is readily apparent that the right of Madge Green in the future income, if any, of the Martha Green trust, cannot be regarded as a vested right. Madge Green is not the widow of Herschel, and, it is reasonable to conclude, she may never be his widow. Or, if she does become his widow at some unpredictable time in the future, Herschel may have died leaving a child or children surviving him. The possibility of issue is commensurate with life. Herschel must not only die first, but he must not die with a child or children surviving him, and there must be a continuance of the marital relationship now existing between Madge and Herschel. Such a right is therefore plainly a mere intangible, inchoate, contingent expectancy, a speculative, conjectural possibility. It could be extinguished by a divorce from the bonds of matrimony. A new wife would regain it subject to the same contingencies now existing, but absolutely free of any claim by Madge. It could be

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extinguished by the sale of trust assets under a mortgage. See *Montgomery v. Equitable Life Assur. Society*, 7 Cir., 83 F. 2d 758, 762. It could be equally extinguished by appropriation under the power of eminent domain, or by waste of the trustee or other person wrongfully in possession. See *Dees v. Cheuvronts*, 88 N.E. 1011, 240 Ill. 486, 491. Should Madge die before Herschel, the right is extinguished. It can not be transmitted by will or the laws of descent. It is one she can not transfer by sale. The right is not transferable by conveyance or assignment, even though Herschel joined therein. Madge can not even release it to the tenant of a freehold estate in the land. See *Miller v. Pence*, 25 N.E. 1030, 132 Ill. 149, 157-159.

The present interest of Madge in the future income of the Martha Green trust cannot even be compared to the right of dower in a married woman. A right of dower in a married woman is not dependent upon the existence or non-existence of issue, as is the present right of Madge Green as the wife of Herschel. Thus, her interest is much less than a right of dower, and in *Illinois*, a right of dower in a married woman, before it has become consummate by the death of her husband, is a mere intangible, inchoate expectancy, and not only is not an estate in land, but does not even rise to the dignity of a vested right. See *Goodkind v. Bartlett*, 26 N.E. 387, 136 Ill. 18, 19. Like an inchoate right of dower, it is not such a right as can be enforced by any proceeding. See *Bigoness v. Hibbard*, 108 N.E. 294, 267 Ill. 301; *Dees v. Cheuvronts*, 88 N.E. 1011, 240 Ill. 486, 491; *Hart v. Lake*, 112 N.E. 286, 288, 273 Ill. 60. See also *Klein v. Mangan*, 17 N.E. 2d 558, 369 Ill. 645, 647.

It is pertinent to point out, plaintiffs do not allege any specific money or property has been lost to the Martha Green trust through the malfeasance of Herschel. It is

altogether possible that no such money or property has been lost. The complaint filed by plaintiffs does not seek, and the court need find nothing adverse to Madge Green. Madge is not threatened, nor can she show she is in any way threatened with irreparable or other damage entitling her to relief. See *Central Cotton, etc. Ass'n v. International, etc. Union,* 280 Ill. App. 168, 180-181. Although Madge has a remote contingent expectancy in the future income, not the corpus, of the Martha Green trust, it is highly improbable, under the circumstances here presented, that she could be injured adversely, or prejudicially affected by the mere possibility that Herschel might subsequently become obligated to restore something to the Martha Green trust estate now incapable of being determined. Even then, on that score, any interest she may have would be enhanced, not irreparably or otherwise injured. Furthermore, inasmuch as Madge has consented to the voluntary resignation of Herschel as trustee of the Martha Green trust estate (Tr. 65), and approved and consented to the appointment of a successor trustee (Tr. 97), she certainly is not in any position now to complain if a subsequent accounting and settlement by Herschel reveals that he has fraudulently, illegally, wrongfully and or negligently caused the loss of any money or property belonging to the Martha Green trust estate.

Federal courts generally accept the principle that an indispensable party is one who has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a condition that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or subject-matter which is separable from the

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interest of the other parties before the court, so that it will not necessarily be directly or injuriously affected by a decree which does complete justice between them, is a proper party to the suit. But he is not an indispensable party, and if his presence would oust the jurisdiction of the court the suit may proceed without him.

In *Atwood v. Rhode Island Hospital Trust Co.*, 1 Cir., 275 F. 513, Certiorari denied in 257 U.S. 661, at 518, the court said:

> "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of the absent party.
>
> If the court can do justice to the parties before it without injuring absent persons, it will do so, and shape its relief in such a manner so as to preserve the rights of the persons not before the court."

See also *Baird v. Peoples Bank & Trust Co.*, 3 Cir., 120 F. 2d 1001, 1003; *Peterson v. Sucro*, 4 Cir., 93 F. 2d 878, 881; *Hudson v. Newell*, 5 Cir., 172 F. 2d 147, 151; *Chance v. Buxton*, 5 Cir., 170 F. 2d 187, 188; *Keegan v. Humble Oil & Ref. Co.*, 5 Cir., 155 F. 2d 971; *Kentucky Natural Gas Corp. v. Duggins*, 6 Cir., 165 F. 2d 1011, 1015.

In *Baltimore & Ohio R. Co. v. Chicago River & I.R. Co.*, 7 Cir., 170 F. 2d 654, Cert denied 336 U.S. 944, at 658, the court said:

> "An indispensable party is one without whom the court can do nothing, or as was said in *Barney v. Baltimore City*, 73 U.S. 280, 284, (an indispensable party is one) whose interest in the subject matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed."

In *Bourdieu v. Pacific Western Oil Co.*, 9 Cir., 299 U.S. 65, at 70, the court said:

> "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result."

See also *Franz v. Buder*, 8 Cir., 11 F. 854, 856, Cert. denied 273 U.S. 756; *Green v. Brophy*, Court of Appeals Dist. of Columbia, 110 F. 2d 539.

Both aforesaid wills, establishing the two trusts here involved, expressly provide that Oscar L. Green and Herschel S. Green shall participate equally in the distribution of the net income of such trusts (Tr. 12, 15). Oscar alleges that Herschel has used his position as trustee to wrongfully pay himself personally upwards of $52,000.00 while he was paid only $620.00 (Tr. 30-32). Madge has no interest, contingent or otherwise, in such proportionate share of the net income presently payable to Oscar. It seems too plain for argument that Madge Green could have any interest in any recovery by Oscar of his definite equal share of the net income of the trusts created by the will of James Allen Green and Martha Green respectively, as a co-beneficiary of Herschel, the primary purpose of this suit.

In *Scott on Trusts*, Vol. 2, Sec. 214, p. 1144, it is said:

> "When a trust is created for several beneficiaries, any one of them can maintain a suit against the trustee to enforce the duties of the trustee to him or to obtain redress for a breach of the trustee's duties to him. This is true whether the trust is created for two or more beneficiaries as tenants in common or joint tenants or for two or more beneficiaries in succession."

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See also *Restatement of Trusts,* Sec. 214, p. 604; 65 *C.J., Trusts,* Sec. 960, p. 1031.

It is equally plain that Madge could have no interest in any restoration which Herschel is required to make to the James Allen Green trust, or in the removal of Herschel as trustee of the James Allen Green trust. Madge has no legal or equitable interest whatever in the trust established by the will of James Allen Green.

Madge Green has no interest in the corpus of the Martha Green trust. Her contingent interest is only in the future income of such trust. An action for injury to property cannot be maintained by a remainderman having only a contingent interest. See *Cummings v. Lohr,* 92 N.E. 970, 246 Ill. 577, 581; *Dees v. Cheuvronts,* 88 N.E. 1011, 240 Ill. 486; *Fifer v. Allen,* 81 N.E. 1094, 228 Ill. 507, 521. See also 33 *Am. Jur.,* Sec. 177, p. 644. It is pertinent to again point out that although plaintiffs ask that Herschel be required to restore to the Martha Green trust any money or property lost thereto by virtue of his wrongful acts, they do not claim or allege in their complaint any specific money or property has been so lost. Strictly speaking, no facts are properly in issue unless charged in the bill, and no relief can be granted for matters not charged. See *Warner v. Mettler,* 103 N.E. 259, 260 Ill. 416; *Martin v. Frank,* 259 Ill. App. 417, 425.

In *Labor Board v. Pittsburgh S.S. Co.,* 340 U.S. 498, at 502, it is said:

> "Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

28 *U S C A*, Section 1652 provides:

> "The laws of the several states, except where the Constitution or treaties of the United States, or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

Judicial decisions are "laws of State" within this section. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541.

The purpose of conformity to State law where federal jurisdiction depends on diversity of citizenship is to prevent the accident of citizenship from changing the outcome, and such purpose extends as much to determining whether court shall act at all as how it shall decide, if it acts. See *Weiss v. Routh*, 2 Cir., 149 F. 2d 193.

In essence, the intent of the decree of the Supreme Court in the *Erie Railroad Co. v. Tompkins* (304 U.S. 64) was to insure that, in all cases where a federal court is exercising jurisdiction solely because of diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of the litigation, as it would be if tried in a state court. See *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S. Ct. 1464, rehearing denied 66 S. Ct. 7, 326 U.S. 806.

The rule requiring federal courts to apply the law of the state local to the situs of the District Court where the action is brought is applicable to federal court equity suits when jurisdiction depends on diversity of citizenship. See *Overfield v. Pennroad Corp.*, 3 Cir., 146 F. 2d 889; *Gibbons v. Brandt*, 7 Cir., 170 F. 2d 385, Cert. denied 336 U.S. 910; *Prudential Ins. Co. of America v. Moore*, 7 Cir., 145 F. 2d

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580, Cert. denied 324 U.S. 8; *Dine v. Edwards,* 7 Cir., 158 F. 2d 17, Cert. denied 330 U.S. 825.

In *Jones v. Bryant* (a case involving a testamentary trust), 204 Ill. App. 609, at 617, the court said:

> "Parties to actions are divided into necessary or indispensable parties, and proper but not indispensable parties. Necessary parties are those without whom the court will not proceed to a decree even as to the parties before it. This class includes all persons who have an interest in the controversy of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its termination may be wholly inconsistent with equity and good conscience."

A clear distinction is made in *Illinois* between present substantial interest and a mere expectancy, or future or contingent interest.

In *Kingsley v. Montrose Cemetery Co.,* 136 N.E. 685, 304 Ill. App. 273, at 282, the court said:

> "The claimant in a proceeding in equity to enforce a trust must show an actual existing interest in the subject matter of the trust *(McGovern v. McGovern,* 268 Ill. 135). 'If we keep in mind the distinction between a mere conditional future interest in a trust estate generally and a present title or interest in the estate, the case is free from difficulty. *Green v. Grant,* 32 N.E. 369, 143 Ill. 61'."

In *Green v. Grant* (a case involving a testamentary trust), 32 N.E. 369, 143 Ill. 61, at 69, the court said:

> "All persons who are legally or equitably interested in the subject matter and result of the suit must be made parties. The interest must, however, always be a present substantial interest, as distinguished from a mere expectancy, or future or contingent interest.

American Bible Society, et al. v. Price, 5 N.E. 126, 115 Ill. 623; Story's Eq. Pl., Secs. 141, 145, 150."

In *Montgomery v. Equitable Life Assur. Society,* 7 Cir., 83 F. 2d 758, at 762, the court said:

"While it is true that all persons who are legally or equitably interested in the subject matter of a suit must be made parties before they can be bound by the decree, yet the interest contemplated by such rule is always a present substantial interest, as distinct from a mere expectancy or future contingent interest. *McFall v. Kirkpatrick,* 236 Ill. 281, 86 N. E. 139; *Green v. Grant,* 143 Ill. 61, 32 N.E. 369. See also *Temple v. Scott,* 143 Ill. 290, 32 N.E. 366."

Under Illinois law, if there is uncertainty either as to the person who is to receive or in the gift itself to the remainderman, the remainder is contingent. See *Hoblit v. Howser,* 170 N.E. 257, 338 Ill. 328,332.

Federal courts generally hold that a party should be aligned upon the side where their interest in and attitude to the controversy really places them. See *Sutton v. English,* 246 U.S. 199; *Venner v. Great Northern Railway Company,* 209 U.S. 24, 31. It is the duty of federal courts to look beyond the pleadings and arrange the parties according to their sides in the dispute. See *Indianapolis v. Chase National Bank, Trustee,* 314 U.S. 63; *Helm v. Zarecor* 222 U.S. 32, 36.

Respondents do not agree with Circuit Judge Schnackenberg (Pet. 52) that *"The fact that defendant Madge is the wife of defendant Herschel is irrelevant,"* or *"That she may have a sympathetic interest in her husband's defense in this case or that his estate upon his death might be larger due to his alleged misconduct as trustee, from which increment she might benefit as his widow at his death, if she*

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survive him and was up until his death still his wife, does not constitute such an interest as would be determinative on the question of realignment of the parties herein." Such determination does not properly portray the real "collision of interests" here involved. The present interest of Madge in her husband's defense can and is a very real thing indeed. Not necessarily alone because her husband Herschel is being charged with wrongfully transferring assets from the James Allen Green trust to the Martha Green trust, and the remote contingent interest she may have in the future income of such latter trust may be enhanced, but because she has unquestionably personally benefited economically by the $52,000.00 and upwards her husband is charged with wrongfully paying himself, and their joint use of trust premises rent free, together with such services as telephone, light, heat, gas and oil for their personal automobiles, medical services and food without charge in addition thereto, while paying his co-beneficiary Oscar only $620.00 contrary to the express, or any conscionable interpretation of the terms of the aforesaid testamentary trusts (Tr. 31-32). Unquestionably Madge will likewise be adversely affected economically if her husband Herschel is now made to give Oscar his rightful share of the money he so wrongfully appropriated and used for his own aggrandizement and comfort as well as that of Madge, his wife. The extent of this vital interest of Madge is amply demonstrated by the fact that when this suit was instituted Madge made no individual effort whatever to seek to have it dismissed as to herself alone, or asked then to be realigned, but immediately ranged herself with Herschel in opposition to the relief sought and attempted to erect an insurmountable blockade to defeat the action at its threshold (Tr. 19-25), claiming that the State court had full and exclusive jurisdiction over the *res* and dominion over all property that is or might be

involved belonging to both trust estates, a position diametrically opposed to that of the plaintiffs. It is reasonably certain she is not now suddenly motivated by any concern about the rights of the plaintiffs. Her efforts to change position now would seem to be a belated bit of strategy designed to exploit a conceived legal technicality.

CONCLUSION

Wherefore, respondents believe that the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, on behalf of Herschel S. Green and Madge Green, should be denied, and respondents should be granted such other relief as to this Court may seem proper.

Dated this 5th day of April, A.D. 1955.

Respectfully submitted,

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